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BEFORE THE

SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF PPL GENERATION, LLC AND PPL MONTANA, LLC

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SURFACE TRANSPORTATION BOARD

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I. INTRODUCTION AND SUMMARY

The Opening Comments filed November 17, 2000 in this critically important proceeding present the Board with a stark choice. If it heeds the arguments of shippers, shipper organizations, short line railroads and governmental interests, the Board will pursue, strengthen and clarify the policy initiatives set forth in its October 3, 2000 Notice of Proposed Rulemaking ("NPR"). The concerns of this large majority of commenting parties are shared and supported by PPL Generation, LLC and PPL Montana, LLC (hereafter collectively "PPL"). The Class I railroads, in contrast, seek to preserve the status quo.

The stakes here could not be higher. The railroad industry has become too big and too driven by self-interest to be effectively regulated under existing rules and policies, and the status quo is unacceptable. Unless it adopts new and stronger regulations and policies, the Board and interested parties may soon:

- See rail-to-rail competition fall to an irreducible minimum;
- See major railroads promise benefits meeting the statutory public interest test that prove to be illusory;
- See service problems go unremedied; and
- See shippers billed for major railroads' mistakes.

Each of these developments would lead to power without accountability for the major railroads. The Class I railroads call on the Board to allow all four of these errors. PPL joins other shippers, including EEI, the Western Coal Traffic League, the American Chemistry Council, USDA, DOT and many others, in calling on the STB to adopt clear, pro-competitive rules that will offset any new railroad market power with new accountability.

Strong measures must be implemented now to enhance competition for and among the major Class I railroads, or else the fundamental structure of the rail industry will be changed in ways that make it far more difficult, if not impossible, to achieve broad intramodal competition. Such a development would inevitably lead to calls for more regulation, since a rail system dominated by an enormous North

American duopoly (or dual monopoly) must not be allowed to operate with neither effective competition nor effective regulation.

It is also time for major Class I railroads to be held accountable for the projections of public benefits on which they base their merger applications. The requirement that applicants keep their promises is fair, and necessary to maintain the integrity of STB merger procedures. However, this basic requisite of responsible administrative action has not always been met in the past. As one of the major Class I railroads observed earlier in this proceeding:

> If anything, the existing policy statement and actual track record of ICC and Board merger decisions over the past two decades have embodied a presumption that every proposed rail consolidation will generate public benefits and that all but the most egregiously anti-competitive combinations receive regulatory approval.

Norfolk Southern comments filed May 16, 2000 in response to the Board's Advance Notice of Proposed Rulemaking in this proceeding, at 9.

To its credit, the Board's NPR calls for reforms designed to enhance rail competition and rail service. Enhanced competition is recognized as necessary to mitigate the enormous concentration of market power threatened by further consolidation among major railroads. Dependable service guarantees, as opposed to empty promises, are understood to be necessary to prevent future meltdowns, or integration problems like those resulting from the acquisition of Conrail by NS and CSX. More competition will also help prevent such problems from occurring, and offer remedies if they do occur.

II. THE MAJOR RAILROADS' ATTEMPTS TO PRESERVE THE STATUS QUO MUST BE REJECTED

PPL and other shippers support the Board's initiatives, even if we question some details of the Board's proposals for implementing them. One would expect the major railroads to join in supporting enhanced competition and kept promises, which are hardly radical proposals.

The real issues in this proceeding should be how these goals are to be achieved, not whether the goals themselves are legitimate. As shown in the opening comments of PPL and others, shippers are concerned that the Board has provided too much flexibility and initiative to the major railroads in meeting the new competition and service objectives, leading to the danger of future compliance with these requirements that is more apparent than real.

A review of the opening comments of the major railroads, however, reveals that they oppose the Board's goals of enhanced competition and binding commitments. Only Union Pacific accepts the need for the Board's proposed "paradigm shift," and UP asserts a number of technical objections. BNSF, NS, CSX, CN and CP all pay, at best, lip service to the Board's goals. What these major railroads really seek is to preserve the status quo.

Remarkably, BNSF never even acknowledges that we are on the verge of the "end game" in the process of railroad consolidation.[1] BNSF and its witnesses, along with several other major railroads, act as if there are likely to be many more Class I rail mergers before the nation is confronted with a rail duopoly, and that this proceeding is somehow premature.

BNSF's position is not merely inconsistent with objective reality. It also ignores the background of this proceeding, including the extensive hearings and comments in Ex Parte No. 582, as well as voluminous filings by PPL and other shippers detailing the basic shortcomings of existing merger rules and other regulatory remedies in the face of major rail consolidations. BNSF and most of the other Class I railroads disagree with the Board's decision that existing rail merger rules and policies are inadequate to deal with present conditions.

Indeed, BNSF goes farther. Not only does it oppose any changes in STB merger rules that would promote competition or increase the likelihood that projected service benefits will be realized, but BNSF wants future merger proceedings -- the very proceedings that are likely to create a rail duopoly -- to be processed on an accelerated schedule. BNSF Comments at 17-23. See also CSX Comments at 57-60.

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[1] Compare UP's Comments at 3-4: "As the Board has found, the next major merger is likely to lead to creation of two transcontinental railroads. NOPR, p. 8. Before approving another major rail merger, the Board should determine whether this final round of railroad consolidation is desirable. Presumptively, this will be the central public policy issue in a future Class I merger proceeding."

In support of this call for expedited merger proceedings, BNSF Witness Pierce attempts to compare major rail mergers with mergers among unregulated industries, ignoring the fact that such industries are generally (1) not an essential part of the country's infrastructure and (2) not monopolies.[2] There are good reasons why Congress has not totally deregulated the railroad industry.

Witness Pierce is less far off the mark when he offers an analogy between FERC merger proceedings, some of which have been approved or disapproved in less than 6 months, and the major rail mergers that are at issue in this proceeding. However, this analogy is also false.

PPL does not oppose a FERC-style screening process to differentiate between mergers that can be expedited and those that cannot, but such screening has already taken place here. We are, by definition, talking about major mergers among the small number of remaining Class I railroads, with particular emphasis on the likelihood of a final consolidation down to two massive rail systems.

Assume FERC were confronted with the prospect of a North American duopoly for gas transmission or for the transmission and distribution of electric power, over the opposition of the Nation's industrial, commercial and residential ratepayers. Witness Pierce

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[2] See also the Verified Statement of CN Witness Black, who argues (at p. 49) for relaxed STB merger standards on the ground that the major railroads' market capitalization puts them in the middle of the Fortune 500. They are still large corporations, they want to be even larger, and they provide an essential service.

cannot seriously suggest that FERC would consider such a proceeding business as usual, to be processed in haste.

There is another significant difference between FERC utility merger proceedings and major rail consolidations. FERC has been able to accelerate its processing of mergers because it has already ordered protections for captive customers, including open access and rate freezes, that provide a large measure of protection against anticompetitive conduct or rate gouging by consolidated gas pipeline systems or mega-utilities. In addition, FERC-approved mergers have been mercifully free of the service problems that have accompanied recent major rail mergers.

If the monopoly power of the major railroads had been constrained by the STB in the manner that FERC has constrained the monopoly power of pipelines and electric utilities, the issues in this proceeding would be very different. But neither open access nor broad rate regulation is acceptable to the railroad industry, which is fiercely resisting even the modest first steps toward pro-competitive policies that the Board has proposed in its NPR. PPL also fully expects the railroads to attack shippers' calls for protections against recovering huge acquisition premiums or the costs of poorly planned or implemented mergers through rate increases.

The major railroads cannot have it both ways. As America's last major monopolies, they can no longer expect a fast track before the STB when they seek to double their size and power, eliminating all but one of their rail competitors. Nor can they expect the free ride that NS says they have enjoyed for the past two decades. If they want the freedom of unregulated companies, they must forego their monopoly power, and accept competition from other railroads.

The best explanation PPL can come up with for BNSF's extreme position is that BNSF is planning to file a major merger application after the moratorium expires. In addition, as in the case of the aborted BNSF/CN merger, BNSF wants its merger application processed under the law as it existed prior to Ex Parte No. 582. And, to make up for lost time, BNSF wants a decision in one year. Other Class I railroads with similar positions in this proceeding may have similar merger ambitions.[3]

The next major rail merger may in fact offer real benefits to shippers, and may even have pro-competitive features. PPL took no position for or against the BNSF/CN merger, or the STB moratorium. PPL believed then, and believes now, that the problems resulting from rail consolidations transcend any particular combination, and require new approaches. The present system is broken, and the cure is emphatically <u>not</u> more major railroad mergers under the old rules, let alone more major mergers on an expedited schedule that impairs shippers' ability to analyze, test and respond to the

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[3] There may also be a strategic component to BNSF's extreme position against meaningful reform of STB merger rules and policies. By arguing vigorously for no change, BNSF is doubtless hoping to shift the focus of this proceeding away from the issue of whether the Board's NPR goes far enough, and force shippers to devote their energies to defending the NPR against BNSF's claims that it goes too far.

applicants' evidence.

III. THE MAJOR RAILROADS' ARGUMENTS AGAINST ENHANCED COMPETITION MUST BE REJECTED

The major railroads, led by BNSF, oppose any departure from the Board's past practice in merger proceedings of imposing competitive remedies sparingly, so that pre-merger competitive options, defined as narrowly as possible, may be preserved but will not be expanded. The major railroads offer various arguments in favor of the status quo, all of which are meritless.

The most fundamental error of the major railroads is that they continue to view rail-to-rail competition as an undesirable force, whose effects in the marketplace for rail transportation services should be minimized. The story of the last twenty years has been the story of major railroads avoiding competition from each other through mergers, and avoiding competition from smaller railroads through paper and steel barriers.

Notably, BNSF and CN completely ignore the paper barrier issue in their comments, while CSX supports paper barriers.[4] It would be interesting to know whether BNSF Witnesses Gomez-Ibanez and Kalt, who complain that the Board's proposed rules are "far more

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[4] UP and the AAR express qualified support for the Board's comments on short line and regional railroads, but address the paper barrier issue only by implication, in praising the industry agreement that the American Short Line and Regional Railroad Association has called inadequate. UP comments at 13, AAR at 24-25, and ASLRRA at 7. NS claims to support the Board's call for consideration of the impacts of mergers on Class II and III railroads, but if merger applicants need not enhance rail-to-rail competition, any such consideration will accomplish little.

restrictive than the tests that antitrust regulators generally apply to other industries" (Verified Statement at 2), are aware of the extent to which major railroads have forced anticompetitive paper barriers on smaller railroads.[5]

It is precisely because of the major railroads' hostility to rail-to-rail competition that this proceeding is necessary. That hostility is not hard to detect. BNSF Witness (and CEO) Krebs states "I know of no other U.S. industry that is expected to give away its customers without compensation as a condition of obtaining federal approval to merge." VS at 8, emphasis added.

In all other industries, customers are lost without compensation every day, with or without a merger, due to competition. Only the railroads regard shippers as their property. As PPL has pointed out, one factor driving railroad mergers is the ability of the merged railroads to combine their captive shippers, and add new ones. Rate increases to these shippers can pay for the acquisition and any implementation problems, as well as providing high profit freight for years to come. It is to deter just such abuses that FERC and many state Public Service Commissions impose conditions to insure that acquisition risks and costs are borne by the merging companies and their stockholders.

Also indicative of the railroads' peculiar attitude is their

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[5] These witnesses go on to argue that "rate caps" protect shippers from excessive rail rates (id. at 6), and it would also be interesting to know whether they reviewed the GAO reports concluding that most shippers regard STB rate regulation as too costly and ineffective.

attempt to define competitive benefits as including their own enhanced market power. See, e.g., NS Comments at 15:

> [V]irtually all railroad consolidations previously approved by the Board and the STB have "enhanced competition" by, among other things, strengthening the effectiveness of competition between railroads and between railroads and other modes through service improvements, efficiencies, enhanced financial viability and other effects.

PPL is not against service improvements or efficiencies, and agrees that these can be enhanced by mergers. Nor does PPL oppose financial viability, though it should not be achieved through increased market power. But there is a big difference between enhancing the ability of a railroad to operate in a competitive marketplace, and enhancing competition. The Board's NPR seeks to promote both goals. The major railroads want only increased economic power, without the responsibility to compete among themselves or with smaller railroads.

NS goes on (Comments at 16) to complain that the Board is proposing "artificial" or "manufactured" rail-to-rail competition. But it is absurd to speak of natural or market-based competition when the railroads have spent the past two decades eliminating their major competitors by acquiring them, and neutralizing their smaller competitors through paper and steel barriers.

NS actually has the nerve to describe as a "minor revision" (Comments at 35) a change it seeks in proposed 49 C.F.R. § 1180.1(c)(1) that would <u>eliminate</u> any obligation on the part of merging railroads to enhance rail-to-rail competition. According to NS, enhanced truck-to-rail competition should, by itself, fulfill the enhanced competition requirement.[6]

This suggestion comes from one of the railroads that justified its Conrail acquisition on the promise of removing 1 million trucks a year from the highways, utterly failed to meet that goal,[7] and now objects to the suggestion that merger applicants should be required to produce their promised benefits. In any event, this is hardly a minor revision for PPL and other captive rail shippers. Only rail-to-rail competition holds out any hope of constraining rail rate increases and addressing rail service problems for captive shippers.

Aside from being bad policy, the major railroads' arguments against enhanced competition are legally unsupported. The principal argument appears to be that the STB is adopting a presumption that future mergers will reduce rail competition. See, e.g., CN Comments at 12, BNSF Comments at 10, CSX at 26, NS at 17

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[6] It gets worse. NS goes on to propose that in the future, if the Board merely orders competitive remedies to preserve (not enhance) pre-merger competition, those remedies must not "endanger the operational or financial success of the consolidated carriers." NS Comments at 67. In other words, only "competition" that does not affect the merging railroads' ability to charge whatever rates they wish would be permitted.

[7] According to the Opening Comments of Shell Oil Company, the actual result was that shippers were "forced to ship traffic by truck that was previously carried by Conrail because of the inability of CSX and NS to move it." Comments at 5.

and AAR at 3.[8]

PPL finds no such presumption in the Board's NPR, though the Board would certainly be entitled to presume that major rail mergers in the future may threaten a reduction in rail-to-rail competition. See the NPR at 13 for an explanation of a number of factors supporting this concern. However, it is also likely that the Board is simply adopting an interpretation of the statutory "public interest" standard that incorporates a greater emphasis on the need for competition among the likely participants in future mega-mergers.

There can be no doubt that the public interest in the ICCTA includes the public's interest in competition. The Rail Transportation Policy calls, in Section 10101(12), for the Board "to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination." Emphasis added. See also subsection (1), calling for "competition and the demand for services to establish reasonable rates for transportation by rail," and subsection (4) calling for "effective competition among rail carriers."

Effective competition is a term of art in the Act. As the ICC explained in Metropolitan Edison v. Conrail, 5 I.C.C. 2d 385 (1989):

> The mere existence of some alternative does not in itself serve as an effective constraint

[8] There has obviously been some coordination of positions here.

> against the railroads charging rates in excess of the just and reasonable rates Congress thought the existence of competitive pressures would ensure.

5 I.C.C. 2d at 413, citing Arizona Public Service Co. v. United States, 742 F.2d 644, 650-51 (D.C. Cir. 1984).

There can also be no doubt that the Board has the authority to modify its public interest analysis to meet changing conditions. See, e.g., American Trucking Associations v. Atchison, T. & S. F. Ry., 387 U.S. 397, 416 (1967):

> Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of law and prudence, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Several railroads praise FERC for revising its merger policies. E.g., CSX Comments at 26 ("The Federal Energy Regulatory Commission revised its merger policy in 1996, with the result that it now focuses more heavily on competition than it did in the past.").[9] Obviously, the STB enjoys similar discretion. As explained above, however, FERC's changes reflect the reduced risk of abuse of market power in the energy industry, while the STB's focus is on the increased (and growing) risk of the abuse of market

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[9] FERC's 1996 Merger Policy Statement has recently been supplemented with new rules designed to clarify how FERC's policies are to be implemented. Order No. 624, 93 FERC ¶ 61,164 (November 15, 2000).

power if there are more major railroad mergers. The STB's call for enhanced competition is amply supported by the law, and fully warranted by current circumstances.

Finally, the major railroads all argue that the Board must not require enhanced competition because the Board will have no principled basis for implementing this requirement. For example, BNSF warns that "the proposed rules would place the Board in the unprecedented and unjustified position of picking winners and losers in the general economy by deciding which shippers or sectors of the economy will be the beneficiaries of any enhanced competition conditions." Comments at 42.

Whatever points BNSF may score for its candor in admitting that shippers without enhanced competition will be "losers" in the general economy are offset by the main thrust of this argument. BNSF and the other Class Is argue that only <u>railroads</u> should be allowed to determine when competitive alternatives will be made available. Based on the past practices of these railroads, the answer is as rarely as possible.

PPL is not alone in voicing the concern that as the major railroads have grown in size, they have increasingly used their market power to force or encourage shippers to use the railroads' preferred sources, markets and routings. See, e.g., PPL Reply Comments on the Board's ANPR at 11. See also the Opening Comments on the NPR of Ag Processing Inc. at 3 (citing to similar comments by other parties), and the Opening Comments on the NPR of the North Dakota Public Service Commission at 2.

Simply stated, shippers understand that the major railroads will continue to seek to minimize rail-to-rail competition whenever and wherever they can. This is one of the reasons shippers question the Board's reliance on merger applicants to decide, in the first instance, how to enhance competition. As their comments in this proceeding show, the Class I railroads will elect to enhance competition by increasing their own market power and promising to attract freight that now moves by truck. This is not good enough.

In any event, the railroads' claim that the Board might act in an unprincipled manner is unfounded. The ICC and STB have hardly been guilty of excessive fondness for rail-to-rail competition in the past. Moreover, the statute provides guidance that the Board should find helpful.

For example, Congress clearly contemplated that the Board would order trackage rights in and near rail terminals, and reciprocal switching agreements, "where such agreements are necessary to provide competitive rail service." 49 U.S.C. § 11102. The Board can and should eliminate the ill-advised threshold showing of anticompetitive conduct required in Midtec Paper Corp. v. Chicago and North Western Transportation Co., 3 I.C.C. 2d 171 (1986), regardless of whether there are future rail mergers. But this step would certainly help promote competition in the event that we do head toward a rail duopoly.

The Board (with help from affected shippers and short lines) will also be able to consider other pro-competitive measures, based on the specific features of future cases. There is little likelihood that the Board intends to order service by two railroads for all affected shippers, given its rejection of a "broad program of open access" (NPR at 16). However, it is a non sequitur, and serves only the railroads' interests in monopoly power, to contend that if all shippers cannot have competitive options, then none should.

Relief from anticompetitive paper barriers imposed on smaller railroads would help many shippers enjoy options that are currently foreclosed. As between the Class I railroads and the STB, the Board is far preferable as an arbiter of when and where enhanced competition is desirable.

IV. THE BOARD MUST HOLD RAILROADS TO THEIR BENEFIT PROJECTIONS

NS contends that the applicants in major rail merger proceedings "have no incentive under existing procedures to 'exaggerate' their claimed merger-related benefits" (Comments at 42), but this is nonsense. The applicants have a powerful incentive to claim benefits that may or may not materialize, and will continue to have that incentive if the Class I railroads achieve the results they seek in this proceeding.

NS contends that the adversary system will expose any exaggeration in applicants' filings, but few, if any, shippers have the resources to check every factual assertion in the 8 or 10 volume applications that typify major merger proceedings. And no shipper can fully test the applicants' projections, even under the current procedural schedule about which BNSF complains at such length.

With stunning audacity, Class I railroads attack the Board for suggesting that future mergers might reduce competition, and then go on to ask the Board to adopt a presumption that the public benefits they claim as justification for further consolidations will occur. Without exception, they insist that they must not be required to keep their promises.

In future merger proceedings, the stakes are likely to be even higher than they were in past proceedings, in which the applicants too often over-promised and under-delivered. Where the potential reward may be to emerge as one of two surviving mega-railroads in North America, the temptation to exaggerate public benefits in order to achieve private benefits will be overwhelming, particularly if there is no penalty for such exaggerations.

The major railroads all cite the possibility of unexpected developments. Even if this is a legitimate concern, it does not follow that merging railroads should not keep their promises. The Class I railroads' formulation would let them overstate the benefits of their consolidations (including competitive as well as service benefits), and then decide for themselves, based on the "dynamics" of a marketplace they will largely control, which promises they will keep.

Can they be serious? <u>None</u> of the Board's other reforms will make any difference, if the major railroads are allowed to claim the benefits they think necessary to obtain STB approval (service improvements, trackage rights, relief from paper barriers, funding of everything out of efficiency gains, labor benefits, whatever it takes), and then simply fail to produce those benefits, citing changed circumstances.

This sort of thing has happened before, with rail mergers and in other industries. Congress provided free broadcast spectrum to the broadcasting industry on condition that the industry switch to digital and high definition television. The industry now wants to keep the spectrum and renege on their conversion commitment. The STB, however, has already seen too many bait and switch mergers. With the "end game" approaching, this can no longer be tolerated.

The Board should strengthen, not weaken, its proposal to require merging Class I railroads to produce the benefits they cited in their applications, making this requirement a condition of all future mergers. There should also be penalties for nonperformance.

If the merger partners experience new circumstances that were not reasonably foreseeable, the presumption should be that they must take steps to produce the promised benefits despite the new obstacles, <u>not</u> that the Board's conditions are automatically rescinded.

There may be circumstances in which a waiver is warranted. But such a waiver must be applied for, other parties must be able to comment for or against the request, and the petitioning railroad should bear a heavy burden of proof as to the need for relief.

"Reasonable efforts to carry out their transaction in a manner that achieves the benefits they projected," the test proposed by UP (Comments at 15) is inadequate. The merged firms, not their customers, must bear the risk of poor planning or poor implementation of major rail mergers.

The railroads provide little support for their position, beyond their own self-interest. BNSF Witness Cornell argues (Comments at 11) that "[m]erging railroads have every incentive to work to realize all of the benefits they have projected," but this is only half true. They have an incentive to work to realize their merger's benefits for themselves, but they also have an incentive to avoid costly merger conditions designed to benefit others.

UP argues (Comments at 17): "Although the Board should test benefit claims for reasonableness and ensure that benefits are merger-related, the Board can rely on competitive forces and the railroads' strong incentives to maximize their profits to compel the railroads to implement their merger effectively." But profit maximization may be better served by breaking than by keeping their commitments. And given the major railroads' vigorous opposition to enhanced rail-to-rail competition in this proceeding, it is not clear what "competitive forces" UP has in mind.

CN Witness Black states that "shippers can negotiate themselves for contractual compensation for any disruptions that occur" (Comments at 50). It would be nice if this statement were true, but it is not. Many shippers cannot negotiate rail transportation contracts of any kind, let alone binding contracts containing strong indemnification provisions. And if the major railroads become even larger and stronger, such protections will be nonexistent.

Illusory protections for shippers and for the public should not form the basis for STB approval of any rail merger, much less rail mergers that may lead to duopoly.

V. OTHER ISSUES

It will be clear by now that PPL takes strong exception to the major railroads' arguments against enhanced competition and against being required to deliver promised merger benefits and avoid service disruptions. As to these issues, PPL stands by its position in its opening comments. However, there are also concerns PPL shares with the major railroads. Like them, PPL is troubled by the vagueness of the Board's proposed regulations, and the Board's failure to respond to the parties' comments in the explanatory text of its NPR.

All parties to this proceeding, including shippers, large railroads, small railroads, railroad workers, cross-border shippers (and carriers) and governmental interests, need to know what to expect from the Board before the next merger application is filed. Due process and commercial necessity require greater clarity than the NPR provides.

PPL believes there is also some merit to BNSF's complaint that imposing enhanced competition requirements only on merging railroads, and not on Class I railroads that do not merge, could unfairly penalize the first major railroads to pursue consolidation.

However, the reaction to the proposed BNSF/CN merger by the other Class Is strongly suggests that if one transcontinental merger application is filed (e.g., by BNSF and its partner(s)), a similar merger application (e.g., by UP and its partner(s)) will not be far behind. In any event, promoting competition should be a continuing goal of STB regulation. There is nothing to prevent the Board from reversing Midtec and mitigating the anticompetitive effects of paper and steel barriers whether or not further consolidation among Class I railroads is imminent.

Finally, PPL reiterates its call for new regulatory protection against the major railroads' practice of using rate increases to cover merger costs, including acquisition premiums and the costs of remedying poorly planned or poorly implemented consolidations. Using higher rates on captive traffic to fund mergers is unfair to shippers and eliminates a powerful incentive for Class I railroads to act prudently and keep their promises. In other industries, the existence of competition prevents such abuses, but the railroad industry's promises not to pay for merger costs through rate increases have too often proved unreliable. The remedial measures proposed at pp. 14-15 of PPL's Opening Comments should be adopted.

VI. CONCLUSION

For the reasons set forth above and in PPL's previous comments in Ex Parte No. 582 and Ex Parte No. 582 (Sub-No. 1), the Board's new regulations for major rail mergers should strengthen and clarify the obligations of the applicants to enhance competition, deliver promised benefits, avoid or provide compensation for service disruptions, and eliminate anticompetitive paper barriers. The arguments of the major railroads in favor of weakening the Board's NPR should be rejected.

Respectfully submitted,

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Dated: December 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served, by first class mail, postage prepaid, on all parties of record this 18th day of December, 2000.

John M. Cutler, Jr.

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